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No. 88-348

In the Supreme Court of the United States

October Term, 1988

NEW ORLEANS PUBLIC SERVICE, INC.,
Petitioner

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, et al.
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS ON BEHALF OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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QUESTION PRESENTED

Whether a federal district court may refrain under the abstention doctrines of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), or *Younger v. Harris*, 401 U.S. 37 (1971), from exercising its jurisdiction to hear a federal claim when adjudication of that issue would intrude upon or otherwise disrupt a state's lawful regulation of retail utility rates and when the state regulatory scheme provides for adequate relief for state and federal claims.

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Interest of Amicus Curiae

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INTEREST OF AMICUS CURIAE

The Pennsylvania Legislature has conferred broad powers upon the Pennsylvania Public Utility Commission (hereafter "Pennsylvania Commission" or "PaPUC") to regulate public utilities in the Commonwealth. The PaPUC has plenary authority and exclusive statewide jurisdiction over the rates and services of Pennsylvania public utilities. 66 Pa. C. S. §§501, 1301, and 1501. As the PaPUC has been charged by the Legislature with the responsibility of regulating public utilities, it is of great import to the Pennsylvania Commission that it, and the Commonwealth courts of review above it, be unfettered in the ability to interpret questions of state law and policy and to exercise their lawful jurisdiction over regulated public utilities. As such the PaPUC supports Respondents, The Council of the City of New Orleans, *et al.*, and urges this Court to affirm the decision below.

The Pennsylvania Commission has requested, and been granted, the consent of Petitioner, New Orleans Public Service, Inc., and Respondents, to its status as an amicus curiae. Pursuant to Rule 36.2 of this Court, the letters of consent are being filed with the Clerk this day under separate cover.

SUMMARY OF ARGUMENT

While the abstention doctrines of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Younger v. Harris*, 401 U.S. 37 (1971), have developed as supposedly distinct principles, they are nonetheless. quite closely related. Intertwined in both doctrines is an underlying animus against interference whenever possible in state affairs. The Pennsylvania Commission submits that in the area of setting retail utility rates, where the states have a long tradition of administrative regulation coupled with judicial review—a tradition which, for most states, pre-dates that of the federal government in regulatory affairs—federal district courts are correct in abstaining from exercising jurisdiction. To do otherwise is to disturb the orderly regulation of utilities by the states.

In order that its brief be as concise as possible in conformity with this Court's rules, the PaPUC will deal only with the narrow aspect of law set forth above. Additionally the Pennsylvania Commission accepts the Counterstatement of of the case as set forth by Respondents, Council of the City of New Orleans, *et al.* (hereafter "Council").

ARGUMENT

The District Court Correctly Abstained From Exercising Its Jurisdiction To Hear A Federal Claim Pursuant To The Abstention Doctrines of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), And *Younger v. Harris*, 401 U.S. 37 (1971), In That Adjudication Of That Claim Would Intrude Upon Or Otherwise Disrupt Louisiana's Lawful Regulation Of Retail Utility Rates

The abstention doctrines of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Younger v. Harris*, 401 U.S. 37 (1971), have developed in the federal courts out of a respect for the states' judicial and administrative processes. This is particularly true in the area of public utility regulation. While federal regulation of wholesale energy transactions or interstate telecommunications and state regulation of retail energy rates and local telephone service do occasionally overlap, these are distinct jurisdictions separated by a "bright line."[1]

This Court was explicit in its recognition of this differentiation in *Burford*. *Burford* involved the regulation of oil fields by the state of Texas. The state had an interest in seeing that the fields were conserved and not quickly depleted, an area of regulation which the federal government had left to the states. *Burford* at 319. The federal court had been requested to enjoin an order of the Texas Rail-

[1] *See Nantahala Power & Light Co. v. Thornburg, et al.*, 476 U.S. 953 (1986).

road Commission on the basis of diversity of citizenship and a due process claim. The Court's decision to abstain was affirmed by the Circuit Court of Appeals and this Court.

This Court noted that the Texas regulatory scheme was of "vital interest to the general public," and included a system of "thorough judicial review." *Id*. at 324-325. The Court found that this was not a system into which the federal courts should interpose their authority lightly:

> "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, ... These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion', restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary ... . This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers."

Id. at 332-333, citing *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 500-501 (1941).

The Court held that abstention was appropriate when there was a "unified method" of establishing policy and deciding cases by the regulatory commission and state courts, and the state system provided for "expeditious and adequate" judicial review. *Burford* at 333-334. The Court noted that federal claims could still reach it through the state appellate process. It warned that "[c]onflicts in the interpretation of state law, dangerous to the success of state

policies, are almost certain to result from the intervention of the lower federal courts." *Id*. at 334.

The actual presence of a question of state law is not critical to abstention as the Court explained many years later in discussing *Burford:*

> In some cases, however, the state question itself need not be determinative of state policy. It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Colorado River Water Conservation District v. United States, 424 U.S. 800, 815 (1976).

The Court expressed this same conviction in deciding *Younger v. Harris*, 401 U.S. 37 (1971), where it reversed a district court order enjoining a state prosecution. The Court noted that the Framers of the Constitution in developing the concept of "Our Federalism," envisioned a government where the interests of both the central government and the states are recognized. *Younger* at 44. While rejecting blind deference to states' rights, the Framers created a system where the central government, "anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id*. This two-way respect has become known as the tenet of comity.

Abstention under the *Younger* doctrine is appropriate where: (1) there are ongoing state judicial proceedings, (2) the proceedings involve an important state interest, and (3) there is an adequate opportunity to raise constitutional

challenges in the state proceedings. *Middlesex County Ethics Committee v. Garden State Bar Assoc.*, 457 U.S. 423, 432 (1982). The *Younger* doctrine is not limited to criminal proceedings but extends to any proceeding "when important state interests are involved." *Id*. *Younger*, and the cases that followed it, express a definite proclivity against Federal Court intervention in ongoing state judicial proceedings except in extraordinary circumstances. *Id*.

Petitioner New Orleans Public Service, Inc. (hereafter "NOPSI"), has urged the Court to reverse because, among other things, no state law is at issue and its complaint rests solely on federal grounds. Petitioner's Brief at 13. The Pennsylvania Commission submits that, as this Court said in *Colorado Water Dist*., the intrusion into a state regulatory scheme is enough to cause disruption in the state's administration of utility rates. The PaPUC further submits, based upon its own experience, that this can trigger unintended results.

On May 31, 1984, the Governor of Pennsylvania approved comprehensive legislation regarding the recovery of gas costs for natural gas distributors with gross revenues in excess of $40 million; Act 1984-74 ("Act 74"), codified at 66 Pa. C. S. §§1307, 1317, 1318 and 2107. Act 74 mandates that each utility subject to its provisions shall pursue a "least cost fuel procurement policy." 66 Pa. C. S. §1318(a)(1)-(4). Like many states, Pennsylvania allows natural gas and electric utilities to recover the costs of fuel on a timely basis without filing a complete rate case each time an adjustment is necessary. Instead, each utility's fuel purchases are reviewed in an annual hearing.

Equitable Gas Company (hereafter "Equitable") is a natural gas distributor subject to the jurisdiction of the

PaPUC. It is a division of Equitable Resources, Inc., which also includes Kentucky West Virginia Gas Company, an affiliated interstate pipeline supplier to Equitable prior to 1988.

Following its first hearing under Act 74 the Pennsylvania Commission disallowed a portion of Equitable's fuel expenses for the period of July 1983 through June 1984 because it had purchased gas from its affiliate, Kentucky West, when less expensive gas was available from other sources in violation of Section 1318(b). The case was subsequently appealed to the Pennsylvania Commonwealth Court which affirmed the Pennsylvania Commission's decision. *Equitable Gas Company v. Pennsylvania Pub. Util. Comm.*, 106 Pa. Commonwealth Ct. 240, 526 A.2d 823 (1987).

At the same time, Equitable also filed a complaint with the U.S. District Court for the Middle District of Pennsylvania. *Kentucky West Virginia Gas Co., et al. v. Pennsylvania Pub. Util. Comm., et al.*, 620 F. Supp. 1458 (M.D. Pa. 1985). Equitable sought a preliminary and permanent injunction and declaratory judgment against the PaPUC and its individual members claiming that the commission's order and certain parts of Act 74 violated the commerce clause, supremacy clause and the first, fifth and fourteenth amendments to the U.S. Constitution.[2] The PaPUC and the (Pennsylvania) Office of the Consumer Advocate, an intervening defendant, argued, among other things, that the Court should abstain from exercising its jurisdiction pursuant to *Burford*.

[2] U.S. Const. art. I, §8, cl. 3; U.S. Const. art. VI, cl. 2; and U.S. Const. amend. I, V, and XIV, §1.

The Court agreed, finding that its intervention would be disruptive of the state's efforts to regulate utilities. *Id.* at 1461. The Court concluded, *sua sponte*, that the three criteria for abstention under *Younger* were also present. *Id.* at 1462. The decision to abstain was appealed to the Third Circuit which reversed and remanded the case to the District Court for trial. *Kentucky West Virginia Gas Co. et al. v. Pennsylvania Pub. Util. Comm. et al.*, 791 F.2d 1111 (3rd Cir. 1986).

The Third Circuit held that the *Burford* abstention is in doubt where substantial questions of federal preemption are involved even though the Court was aware that its decision would disrupt the regulatory scheme in Pennsylvania. *Id.* at 1115-1116. *Younger* abstention was also inappropriate. The Court stated that the mere existence of state judicial proceedings is not enough to justify abstention when state interests are foreclosed or preempted by the Constitution. *Id.* at 1116-1117.

Following a trial on the merits the District Court found in favor of the Pennsylvania Commission and the constitutionality of Act 74. *Kentucky West Virginia Gas Co., et al. v. Pennsylvania Pub. Util. Comm. et al.*, 650 F. Supp. 659 (M.D. Pa. 1986). Its findings were ultimately affirmed by the Third Circuit. *Kentucky West Virginia Gas Co., et al. v. Pennsylvania Pub. Util. Comm. et al.*, 837 F.2d 600 (3rd Cir. 1988) *cert. denied,* U.S. , 109 S.Ct. 365 (1988).

Following the Pennsylvania Commission's decision in its 1986 Act 74 proceeding, Equitable appealed to the state courts while filing an action in federal court again raising supremacy clause and commerce clause claims. *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util.*

Comm., 862 F.2d 69 (3rd Cir. 1988). In an unreported decision, the District Court for the Middle District of Pennsylvania reversed the PaPUC in part. The Third Circuit reversed the District Court and held again that Act 74 violated neither the commerce nor supremacy clauses of the Constitution. *Id.* at 72-74.

Equitable took no appeal of the PaPUC's order following its 1987 annual review of fuel purchases, nor did it file a complaint in federal court.

However, following the PaPUC's order in Equitable's 1988 Act 74 proceeding, Equitable appealed the commission's decision to the Pennsylvania Commonwealth Court. That appeal is pending at Docket No. 2324 C.D. 1988. The company has again filed a complaint in Federal District Court alleging preemption and other constitutional violations. U.S. District Court for the Middle District of Pennsylvania Case No. CV 89-0124.

The Pennsylvania Commission understands the federal courts' desire to determine important questions of federal law. However, when the district courts intervene in such matters it has a discouraging effect upon the state regulatory mechanism. In addition to having to continually defend actions in federal court, the pending federal actions keep the state regulators, as well as the regulated industry, unsure of the challenged state law. This results in regulation which must remain uncertain pending litigation for long periods of time.

For example, after the District Court reversed in part the PaPUC's 1986 Act 74 order regarding Equitable's gas purchases, it became necessary for the Commission to alter procedures for all utilities subject to Act 74.

By Secretarial Letter dated April 11, 1988, the Commission notified the Company that the Commission had instituted an investigation to determine the lawfulness of the rates proposed in the supplements pursuant to the requirements of Section 1307(f)(2) of the Public Utility Code. The investigation was opened at R-880958 and assigned to Administrative Law Judge Herbert Smolen. The Commission also directed PG&W, as follows:

'We wish to call to the attention of all parties and the Office of Administrative Law Judge, an order issued October 26, 1987, in the case of Kentucky West Virginia Gas Company, et al. v. Pennsylvania Public Utility Commission, Civil Action No. 86-1380, United States District Court for the Middle District of Pennsylvania, Slip Opinion, October 16, 1987. This order made final a previous order by the Court dated July 13, 1987, which inter alia, found the Commission practice of employing projections of wholesale gas rates regulated by the Federal Energy Regulatory Commission, in the setting of prospective gas cost rates to be violative of the Supremacy Clause of the U.S. Constitution. This order is currently on appeal to the U.S. Court of Appeals for the Third Circuit. Resolution of this issue may not occur prior to the close of the record in this proceeding. Therefore, Pennsylvania Gas & Water Company is directed to modify, if necessary, its projections of future gas costs so as to adhere to rates as stated in currently effective Federal Energy Regulatory Commission tariffs. The parties are reminded that updates relating to changes in purchased fuel expense must be received no later than thirty (30) days prior to the close of the record.'

Pennsylvania Pub. Util. Comm. v. Pennsylvania Gas and Water Co., 1988 Pa. PUC LEXIS 460, 40-41 (September 30, 1988) (citation omitted). When the Third Circuit restored the Pennsylvania Commission's order, procedures had to be adjusted again.

It cannot be that the state courts are unable to consider federal questions. Recently this Court affirmed an opinion of the Pennsylvania Supreme Court which found lawful a state statute which excluded for ratemaking purposes expenditures by electric utilities for generation facilities which were planned but never built even though the expenditures were reasonable when made. *Duquesne Light Co. v. Barasch, et al.*, U.S. , 109 S.Ct. 609 (1989). The Pennsylvania Supreme Court, in reversing a PaPUC decision, held that the law did not take the utilities' property in violation of the fifth amendment to the Constitution. *Id.*, 109 S.Ct. at 614.

The statute upon which that decision turned was tested in the state administrative and judicial system. However, Act 74, which involves the recovery of fuel acquisition costs, has been and remains the subject of review in the federal court system. The federal courts, whether through intention or misadventure, have become a part of the state regulatory system in Pennsylvania. This runs contra to *Burford*, *Younger*, and their progeny wherein the Court has evidenced a respect for state judicial and administrative systems. Such respect would allow a state agency or court the opportunity to reconcile its action or underlying statute with federal law before a federal court intervenes.

As the Fifth Circuit noted in *New Orleans Public Service, Inc. v. the City of New Orleans, et al.*, 798 F.2d 858 (5th Cir. 1986), the District Court correctly concluded that

to exercise its jurisdiction would be to intrude upon a complex state regulatory system. *Id.* at 861-862. The Court was aware that the Louisiana judicial system would be fully able to adjudicate any complaint NOPSI might have with an order of the City Council. The Court concluded that *Burford* abstention was appropriate. *Id.*

The Court also found that conditions to justify abstention under *Younger* were also present. *Id.* at 863-864. Applying the three criteria explained in *Middlesex County*, the Court stated that the administrative proceeding before the Council was an ongoing judicial proceeding in that it was within the appellate jurisdiction of the Louisiana courts, the interest of the Council in setting retail electric rates was "clearly important" and a matter reserved to the states, and that NOPSI would have a full and fair opportunity to litigate any federal claims through the appellate process. *Id.* Additionally, there was no evidence of "bad faith, harassment or other exceptional circumstances." *Id.*

When this matter returned to the Fifth Circuit (for the third time), the Court noted that there had been no important change in circumstance since its 1986 decision. *New Orleans Public Service, Inc. v. The City of New Orleans, et al.*, 850 F.2d 1069 (5th Cir. 1988). The main difference was that by 1988 Council had completed its investigation into NOPSI's Grand Gulf I involvement. *Id.* at 1079. NOPSI still had the opportunity for judicial review in the state courts before it, and it has filed such an appeal. Therefore, the Fifth Circuit correctly affirmed the District Court's decision to abstain upon the same grounds as it had in its 1986 opinion.

NOPSI argues that federal preemption precludes even the consideration of this matter in the state courts.

Petitioner's Brief at 2, 13. In arguing against abstention under the *Younger* doctrine, NOPSI states that abstention is inappropriate "when the invalidity of the state proceeding and order is clear on its face." *Id*. at 35-38. This is nothing more than a request to rule on the merits of NOPSI's preemption claim and is out of place in an appeal on abstention.

This Court has already rejected this reasoning in *Younger* where it explained an earlier decision[3] which seemed to condone such action:

> The District Court, however, thought that the Dombrowski decision substantially broadened the availability of injunctions against state criminal prosecutions and that under that decision the federal courts may give equitable relief, without regard to any showing of bad faith or harassment, whenever a state statute is found "on its face" to be vague or overly broad, in violation of the First Amendment. We recognize that there are some statements in the Dombrowski opinion that would seem to support this argument. But, as we have already seen, such statements were unnecessary to the decision of that case, because the Court found that the plaintiffs had alleged a basis for equitable relief under the long-established standards.

Younger at 50.

Granting of NOPSI's appeal on these grounds will open the door to federal court challenges to state regulatory laws and orders. Such "on its face" review will result in placing at least some of the power to abstain, or more likely the power to refrain from such action, in the hands of the person who drafts the complaint.

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[3] *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

CONCLUSION

However this Court rules, the Pennsylvania Commission wants it to be aware that its decision will be felt in administrative agencies and courts throughout the country. When the proper safeguards and remedies of judicial review are present, the state courts should be allowed to review the impact of state laws or regulatory schemes may have upon federal claims. The Court is urged to affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that completed copies of the Brief of Amicus Curiae Pennsylvania Public Utility Commission in Support of Respondents were forwarded to counsel for each party this day, March 31, 1989, by First Class Mail.

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